

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

SHOWTIME NETWORKS INC.^{1/}

Employer

and

Case 31-RC-8084

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, MOVING PICTURE
TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES, ITS TERRITORIES
AND CANADA, AFL-CIO, CLC (IATSE)

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.^{2/}

^{1/} The names of the parties appear as corrected at the hearing.

^{2/} The Employer, in conducting its business operations, annually purchases and receives at its Los Angeles, California facility goods or services valued in excess of \$50,000 directly from points outside the State of California and annually derives gross revenues in excess of \$500,000.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

4. Based upon the record herein, no question affecting commerce exists concerning the representation of the petitioned-for unit within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the following reasons.

The sole issue presented at the Hearing was whether the story analysts retained by the Employer at its facility in Los Angeles, California are independent contractors or employees within the meaning of the Act.

FACTS

The Employer is a cable television network that solicits scripts from writers. The scripts that are selected are developed into programming for broadcast. Scripts are submitted to the Employer's creative executives who forward them to the Story Department where they are logged in by title, author, and date of receipt. The scripts are then assigned to story analysts, also called "readers". Story analysts prepare "coverages" on the scripts. A "coverage" is a synopsis of the script consisting of a summary of the plot and a description of the characters. In addition to the summary, story analysts provide their own comments concerning the quality of the script.

When the Employer needs the services of story analysts, coordinators in the Story Department contact individuals listed on a roster of about 14 story analysts. Story analysts are not obligated to accept an assignment. They may turn it down for any reason or no reason at all. Story analysts are not restricted as to locale of performance. They may work out of their home or anywhere they choose. In performing work on the assignment, story analysts use their own material and equipment, such as personal computers. They set their own hours, pay for transportation and all other costs incidental to the assignment. They are not obligated to work exclusively for the Employer. They may and do work for other production companies and networks.

Story analysts are selected based on the results of a test administered by the Employer's Story Department coordinators. The story analysts are asked to prepare

a coverage on a script, or “sample”. The coordinators evaluate the test. They look at how each story analyst retells the story; they determine whether the story analyst’s account is precise and concise; and they check for grammar and spelling errors. In general, they look to see whether, substantively, the story analyst’s coverage accurately reflects the story. Successful story analysts are given feedback, or “notes”, on their summary. The feedback includes guidelines on what to avoid in writing, such as grammatical errors, spelling, tense and tone of the summary. Regardless of the test result, story analysts get paid for participating in the test.

No academic degree is required for the position of story analyst. However, a good writing ability and an understanding of character and story development are advantageous. The Employer does not have a training program for story analysts. Samples of coverages are given to newly retained story analysts to give them an idea of how the Employer wants them written. Story analysts are not disciplined or denied payment due to errors in grammar, or form, or quality of the substance or the content of the coverages they submit. They are not required to correct or redo long coverages when errors in grammar or other deficiencies are detected. On rare occasion, rewrites have been requested on short coverages due to dissatisfaction with their content. However, payment is never withheld.

The rate of pay story analysts receive is published in a manual entitled “Story Department Coverage Guide”, under the sub-heading of “Freelance Reader Rates.” The rate is based, *inter alia*, on the type of script, i.e. book, manuscript, or screenplay, and the number of pages contained in the script. A two-day deadline, or turn-around time, is required by the Employer for screen plays. This deadline is calculated from the time the assignment is picked up to the date the completed work and the script are returned to the Employer. Books require a longer turn-around time. In an emergency situation story analysts have been granted extensions to turn in their work. There is no loss or reduction in pay, or other adverse action for late submittal. In addition to the established rate, the Employer pays extra sums for scripts that require “Rush” turn-around. For instance, the Employer pays an additional \$15 for overnight

turn-around for screen plays; \$10 extra for overnight turn-around for series, and \$25 extra for a turn-around of two days for books. Story analysts are paid based on vouchers they submit to the Employer when they turn in their work. No deductions or withholdings are taken out of their paychecks. They do not receive fringe benefits. They, like other of the Employer's vendors, are assigned a vendor number and complete IRS Form W-9 (Request for Taxpayer Identification Number and Certification). At the end of the year the Employer provides them with an IRS Form 1099 for income tax purposes.

Coverages are submitted on floppy disks that the Employer provides, or by e-mail addressed to one of the Story Department coordinators. The Employer also provides a CD-ROM computer disk with the "Studio System ScriptLog" template, and instructions on its installation on personal computers, and its use in preparing a coverage. The "Studio System ScriptLog" is the Employer's computer system in which all coverages are stored. Story analysts are required to use the ScriptLog program so that the coverages they turn in will be compatible with the Employer's system. The Employer requires that coverages for screenplays be double-spaced with a one-inch margin; for books, the coverage must be two to four double-spaced pages with a one-inch margin; the comments page should be half a page to a full page, single-spaced. Story analysts are told not to use the first person or derogatory remarks, and to refrain from being cynical or sarcastic in their writing. Story analysts are also required to include the name of the project, the correct spelling of the name of the executive, and the dates on which the material was picked up and returned. This information must be on the top page of the coverage. Telephone numbers are provided for technical support both for formatting the ScriptLog program, and other computer related problems.

The script and its related coverage are referred to as a "package" This package is submitted to either the executives in the story group or the executives in the series group for review and determination as to whether the project should go forward. Once a determination in favor of proceeding is made, negotiations with the writer's

agent, attorney, or manager begin. From there the project goes into development for broadcasting.

LEGAL ANALYSIS

Section 2(3) of the Act provides that the term “employee” shall not include “any individual having the status of an independent contractor.” The Board in *Roadway Package System*, 326 NLRB 842 (1998) reexamined the test for determining whether an individual is an employee or an independent contractor. The Board used the common-law agency test as applied by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), and considered all of the incidents of the relationship between the company and certain drivers and concluded that the drivers were employees under Section 2(3) of the Act.

Under the common-law right-of-control test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. On the other hand, where control is reserved only as to the result sought, an independent contractor relationship exists. In *Roadway*, the Board stated that the “right to control” the manner and means of the work performed by the individual whose status is at issue is not the exclusive consideration in making an employee versus independent contractor determination.

No single factor is controlling in making the determination. “All of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Id.* at pg. 850.

The following are among the factors that should be considered:

1. The extent of control which the employing entity exercises over the details of the work;
2. Whether or not the one employed is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employing entity or by a specialist without supervision;
4. The skill required in the particular occupation;

5. Whether the employing entity or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is part of the regular business of the employer;

Id., at fn. 32, Citing Restatement (second) of Agency, Section 220 (1958).

In applying the foregoing to the facts in this case, I find that the various factors of the common-law agency test weigh heavily in favor of an independent contractor status for the petitioned-for story analysts. My conclusion is based on the following.

Evidence pointing toward Employee Status

There are certain factors in the instant case which are indicative of employee status.

The absence of a stated length of employment could be viewed as envisioning steady employment over a period of time. Story analysts do not have to be highly educated or highly skilled. Both factors would favor a finding of an employer-employee relationship.

Since each coverage prepared by the story analysts is part of the “package” that influences the Employer’s decision as to the viability of a script, story analysts’ function can be said to be an essential part of the Employer’s business, a factor also mitigating toward an employer-employee relationship.

The evidence indicates that the Employer requires that story analysts avoid certain types of language, such as derogatory remarks, and comply with a specific format in writing their synopsis. Specific guidelines are also provided for returning work to the Employer. This could be viewed as control that is at variance with an independent contractor status.

The extent of the Employer's control in this case is analogous to that of the employer in *DIC Animation City*, 295 NLRB 989 (1989), also an entertainment industry case. In *DIC Animation City*, the employer required that the writers conform to specifications pertaining to script length, outline length, premise length, and margins and lines per page per episode. The Board held that the employer's limited control is insufficient to warrant a finding that the writers are employees. "The end product remains primarily the independent work of the writers." *Id.* at pg. 991. (Emphasis added).

Finally, two story analysts who testified at the hearing stated that they believed that they were employees.

Evidence pointing toward Independent Contractor Status

I find that the following factors convincingly demonstrate that the story analysts are independent contractors.

The Employer does not require that they work for it exclusively. Rather, the evidence indicates that story analysts who perform work for the Employer also work for other companies and networks. Story analysts fix their own work hours, and, since they control the amount of work they are able to engage in, they have the ability to influence their income.

Story analysts own the tools and material used in performing their work. They control all costs incidental to their work, and determine where and when to perform work for the Employer. They are free to accept or reject an assignment.

The Employer pays story analysts a pre-established rate for each type of script they work on. There are no fringe benefits. Taxes or other payroll deductions are not withheld from their paychecks.

Although they are required to conform to a certain stylistic format in preparing their coverage, there is no evidence that story analysts are restricted in the substance or content of their synopsis. There is no assistance or guidance from the

Employer on the content of the coverages. They are not told “what” to say. Rather, they are instructed to “simply tell us what works and what doesn’t work and we will decide if it fits into our programming needs.” (Employer’s Exhibit #1, pg. 2). Thus, the substance of the coverage remains primarily the independent work of the story analysts.

The Board has acknowledged that employment in the entertainment industry is often on a freelance basis and lacks some of the usual indicia of employee status. See, BKN, Inc., 333 NLRB No. 14, 3 (2001). However, the fact remains that the story analysts in this case, not the Employer, control the substance or content of their synopsis and comments.

CONCLUSION

This case is factually distinguishable from *BKN, Inc.*, supra. In *BKN* the issue dealt with the status of freelance writers and freelance artists and designers. There, the Board found that these individuals were employees within the meaning of Section 2(3) of the Act. The Board premised its decision on essentially three factors:

- (1) “The Employer specifies what the writers are to produce from the beginning of the script-writing process until its end, and the Employer’s production team guides the writers’ performance of their work at every step of the process, and oversees the writers’ creation of their final products.” *Id.*, at pg. 2. (Emphasis added).
- (2) The writers work exclusively for the employer; and
- (3) The employer requires that the freelance artists and designers sign confidentiality agreements regarding their work for the employer.

The factors on which the Board’s decision turned in *BNK* clearly do not exist in the instant case.

Having found, therefore, that the petitioned-for story analysts are independent contractors, the petition shall be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of § 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 5, 2002.

DATED at Los Angeles, California this 22nd of March 2002.

/s/ James J. McDermott
James J. McDermott, Regional Director
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